IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-928

FRANK L. PARKS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Upon A Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on October 10, 1980, not be granted.

OPINION BELOW

The judgment of the Supreme Court of Virginia is a published Opinion reported as *Frank L. Parks* v. *Commonwealth of Virginia,* 221 Va. ____, 270 S.E.2d 755 (1980). A copy of the Opinion is contained in the Appendix to the Petition for a Writ of Certiorari at Appendix A-1.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Does a nominal leasehold interest in a building itself create a reasonable and legitimate expectation of privacy for the nominal leaseholder in that building such as will invoke for him the strictures of the Fourth Amendment and the Exclusionary Rule, notwithstanding the facts that he rented the premises for his son's business, that he was ordered by that son to stay off the property, and that he has no knowledge of any of the events that go on in the building?

2. Does this case require or justify the exercise of this Court's discretionary jurisdiction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the Appendix to the Petition for a Writ of Certiorari at A-3 through A-4-(2).

STATEMENT OF THE CASE

The published Opinion of the Virginia Supreme Court, contained in the Appendix to the Petition, sets forth the facts regarding the "search" itself. The following statement relates to the specific issue[1] decided below, i.e., whether petitioner had

[1] Since the Virginia Supreme Court found that petitioner had no reasonable or protected privacy expectation in the building, that Court made no determination of the lawfulness of the patrolman's investigative procedures.

a reasonable and legitimate expectation of privacy in the premises involved to invoke the Fourth Amendment protections.

These premises, located at 408 North 5th Street in the City of Richmond, appeared both "from the outside" and by "looking through the open windows" to be "an abandoned building." (Aug. 28-29 tr. 142). Indeed, "in this particular block [all] the buildings appear from the outside to be abandoned." (Aug. 8 tr. 20). The fact that petitioner was the nominal lessee of the building was not disputed by the Commonwealth. (Aug. 8 tr. 28). The petitioner himself stated, however, that he had "no knowledge of anything that went on" in the building and that his purpose for renting the building was to "get his son off the street" and set him up in a business. (Aug. 28-29 tr. 47, 207). Petitioner's son ordered him to stay off the premises;[2] he did not want him "down there." (Aug. 28-29 tr. 117).

Testimony of petitioner's daughter, Stephanie Parks, revealed in pertinent part:

> Q. All right. Did Frank, Jr., let you and your father [petitioner] in when you came down there all the time?
>
> A. Well, for a while he did and he'd go down there sometimes, too, and paint all that, but after a while Frank got where he wouldn't even go down there the weekends he'd go off with his friends, and then after I guess I'd been painting maybe a month and a half and he told me and my dad and Mary Anne just to stay out of there. Just not to come down there, and the [sic] told me he didn't want me to paint and as far as he was concerned, you know, I was fired off the job. He didn't want me down there.
>
> Q. When was that?
>
> A. I think it was at the end of October. I'm not sure exactly when, it was sometime in October towards the end. Maybe—possibly the beginning of November, but I think

[2] Of course, the petitioner was not at the building when the "search" was conducted. (Aug. 8 tr. 23-24).

it was the end of October. It's been so long. I know it was either October or November [of 1979].[3] (Aug. 28-29 tr. 117).

Testimony of Police Detective Earl Clarke revealed in pertinent part:

Q. [W]hat statements did [petitioner] make to you?

A. He stated that he had to sign the lease on the building at 408 N. Fifth Street for his son, but he had no knowledge of anything that went on. (Aug. 28-29 tr. 47).

ARGUMENT

I.

The Petitioner Had No Reasonable And Legitimate Expectation Of Privacy To Permit Him To Assert That A Search Of The Building Was Illegal.

The bare fact that the lease to the building was in the name of the petitioner was the sole evidence and basis tendered by him at the pretrial suppression hearing[4] to establish his "standing" and expectation of privacy. (Aug. 8 tr. 28-29). Even in his "Reply Brief"[5] filed in the Supreme Court of Virginia, petitioner simply argued that "[t]he Commonwealth's claim that the [petitioner] has not borne his burden[6] in showing standing or an expectation of privacy in the

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[3] The "search" by Patrolman Wright occurred on May 4, 1979. (Aug. 8 tr. 14-15).

[4] At that suppression hearing the Commonwealth, citing *Rakas* v. *Illinois*, 439 U.S. 128 (1978), asserted *inter alia* that the petitioner lacked "standing." (Aug. 8 tr. 43).

[5] This was petitioner's final brief.

[6] As the petitioner correctly concedes (Petition at 16), the accused has the burden of showing that he had a reasonable and legitimate expectation of privacy in the premises in question. *See Simmons* v. *United States*, 390 U.S. 377, 389-390 (1968); *Rakas* v. *Illinois*, 439 U.S. 128 at 130 n. 1 (1980); *Rawlings* v. *Kentucky*, ____U.S.____, 48 U.S.L.W. 4885, 4887 (1980).

instant case is specious . . . [because] [b]y stipulation at the suppression hearing, by testimony of the Commonwealth's own witness and by documentary evidence, defendant's leasehold interest in the searched premises was established." (Reply Brief at 1). The Virginia Supreme Court in its published Opinion recited petitioner's argument by saying that "Parks contends that the fact that he maintained a leasehold on the property is sufficient to establish his privacy interest against warrantless police intrusion into the building." (App. A-1-(8)).

A property interest alone is not sufficient to invoke the Fourth Amendment. *See Rakas* v. *Illinois,* 439 U.S. 128 at 144 n. 12 (1980); *United States* v. *Salvucci,* ____ U.S. ____, 48 U.S.L.W. 4881 (1980). In *Salvucci,* this Court said:

> While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated . . . property rights are neither the beginning nor the end of this Court's inquiry. In *Rakas,* this Court held that an illegal search only violates the rights of those who have "a legitimate expectation or privacy in the invaded place." (Citations omitted). *Id.* at 4883.

The petitioner now attempts in this Court to modify or at least refine his position.[7] He points not only to the leasehold interest but also to alleged "use of the premises for storage of goods or personal belongings." (Petition at 10). The respondent submits, however, that his position—even if it is considered by this Court—still fails. It is clear that as a practical matter the petitioner had no ability to exclude anyone from the premises, because he had himself been excluded and ordered by his son to stay away. Since by his own admission he was unaware of anything that went on there,[8] he could hardly maintain with validity that he had a legitimate and reasonable expectation of

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[7] On October 16, 1980 the petitioner filed a notice in the Virginia Supreme Court of an intent to apply for a rehearing, but on November 10, 1980 he filed notice of his abandonment of that intent.

[8] Contrary to the petitioner's suggestion (Petition at 15-16), his denial of knowledge of what "went on" there was not limited to "illegal activity." (Aug. 28-29 tr. 47).

privacy on the ground that he was the owner of some furniture and other property located within the building. There was no evidence that the *petitioner* knew of, had arranged for, or had taken normal precautions—or any precautions at all—to secure his privacy with regard to the furniture or any other items of property located there.[9]

II

This Is Not A Case Which Requires Or Justifies Exercise Of This Court's Discretionary Jurisdiction.

The petitioner recognizes that this Court "has recently decided cases adverse to [his] standing in asserting Fourth Amendment protection," but he argues that those cases did not involve "privately leased premises." (Petition at 7). He cites no material conflict, however, among the federal circuits or among the state courts concerning the application of *Rakas* v. *Illinois, supra, United States* v. *Salvucci, supra, Rawlings* v. *Kentucky, supra,* or *United States* v. *Payner,* ____U.S.____, 48 U.S.L.W. 4829 (1980), the decisions to which he refers.

It does not help the petitioner to observe that the precise Fourth Amendment issue "under the circumstances of the instant case" has not been specifically "settled by this Court." (Petition at 7). There is no reason why it should be. The fact that an issue in a particular context has not been resolved by the Supreme Court has never been a recognized basis for the grant of certiorari. Moreover, it surely would be premature to grant Supreme Court review in a case such as this one on the heels of the several recent decisions of this Court without allowing more time for lower courts to interpret and apply them.

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[9] The Virginia Supreme Court pointed out that "[t]he record is devoid of any evidence that [petitioner] ever attempted to regulate any activities there." (App. A-1-(9).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jerry P. Slonaker, Assistant Attorney General of Virginia, counsel of record for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 6th day of March, 1981, three copies of the foregoing brief for the respondent in opposition to the granting of a writ of certiorari were mailed first class, postage prepaid, to David M. Shapiro, Esquire, Caudle & Shapiro, 3415 West Cary Street, Richmond, Virginia 23219, counsel of record for petitioner.

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